Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE AMERICAN
LAW REGISTER
FOUNDED 1852
UNIVERSITY OF PENNSYLVANIA
DEPARTMENT OF LAW
VOL. { 54 O. S. / 45 N. S. } DECEMBER, 1906. NO. 12.

FEDERAL TREATIES AND THE STATE POLICE POWER.

It is no doubt an accepted maxim of international law that every sovereign nation has the power, inherent to its sovereignty and essential to its self-preservation, to forbid the entrance of foreigners into its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[1] Nor is there any doubt that under the Federal Constitution the treaty-making power is vested in the national government. There is a doubt, however, whether the President and Senate can by means of a treaty with a foreign power force upon a State citizens who are unwelcome to it, or go still further and by means of such a treaty enter the portals of a State and dictate the status of such persons within its borders.

But three constitutional provisions even hint at any such power. The first of these is the Sixth Article of the Federal Constitution, which provides that the

[1] See opinion in *Nishimora Niskiu* v. *U. S.*, 142 U. S. 651, 659, 12 Sup. Ct. Rep. 336; *Chae Chang Ping* v. *U. S.*, 130 U. S. 581, 9 Sup. Ct. Rep. 623.

"Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

The second is the clause of Section 1, Article 8 of the Constitution, which vests in Congress the power

"to regulate commerce with foreign nations and among the several States and with the Indian tribes."

The third is the Fourteenth Amendment, which provides that no

"State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

As far as the Sixth Article of the Constitution is concerned it is clear that a national treaty, when properly enacted, is a supreme law of the land, and that state statutes or practices and state constitutional provisions must yield thereto.[2] It is as equally clear, however, that the treaty itself must be constitutional,[3] and this being so, it should be clear that the President and Senate cannot by the exercise of the treaty-making power deprive a State of its prerogatives or of that measure of home rule which, if not actually guaranteed to it by the Constitution, was never surrendered by it. The courts, indeed, have repeatedly held, and this in the face both of the Fourteenth Amendment and of the so-called commerce clause of the Constitution, that the several States never surrendered to the nation as a whole or relinquished the power to protect their own public health, their public morals and

[2] *Hauenstein* v. *Lynham*, 100 U. S. 483; *Ware* v. *Hylton* 3 Dall. 199; *Ex parte Cooper*, 143 U. S. 472.

[3] Cooley, Principles of Const. Law 117; Story on Const. Sec. 1508.

their public safety;[4] that under their inherent right of self-protection they can prevent the entrance into their borders of paupers, convicts, lewd persons, persons infected with contagious diseases, and slaves; that they can protect themselves against diseases both to the body and to the mind, to the body politic as well as to the body personal.[5] In the case of *Groves* v. *Slaughter*,[6] the Supreme Court in passing upon the validity of a constitutional provision of the State of Mississippi, which declared that the introduction of slaves into that State as merchandise or for sale should be prohibited from and after the 1st day of May, 1833, used the following language:

"Is not this a commerce carried on between man and man in the State of Mississippi? Is it not a matter that does not affect other states? Is it necessary for the general government to interfere for the purpose of executing its powers? It is the importation of a slave: the sale of a slave. His being a slave; his being a subject of sale, is a matter depending solely on the State of Mississippi. It is by the local law alone that the subject-matter of importation and sale is created. No other state is affected by its existence or non-existence."

In the case of *New York* v. *Miln*,[7] the court unqualifiedly granted the proposition that a State might exclude

"pestilence either to the body or mind, shut out infectious diseases, obscene paintings, lottery tickets, convicts and other criminals, as well as paupers and vagabonds."

In the Passenger Cases,[8] Mr. Justice Wayne laid down the proposition that paupers, vagabonds, criminals and fugitives from justice never seem to have been considered as the subjects of lawful national intercourse and that therefore the right of the State to exclude them and to

---

[4] *Missouri K. and T. R. Co.* v. *Habers*, 169 U. S. 613, 18 Sup. Ct. Rep. 488; *Campagnie Francaise de Navigation* v. *State Bd. of Health* 25 So. (La.) 591; *Wilson* v. *Alabama G. S. R. Co.* (Miss.) 52 L. R. A. 357.

[5] *New York* v. *Miln*, 11 Pet. 102; Passenger Cases 7 Howard 426. No question of treaty rights, however, was involved in these cases.

[6] *Groves* v. *Slaughter*, 15 Peters 449.

[7] 11 Peters 102.

[8] 7 Howard 426.

pass reasonable regulations in relation to them was evident. It is true that in some later decisions the judges have been more cautious in their statements and that they have held unconstitutional State statutes which imposed a tax on the owner or master of every vessel for every passenger landed;[9] which required the owner or consignee of every vessel to give a bond for every passenger conditioned to indemnify the state authorities against any expense for the relief or support of such passengers, or in lieu thereof to pay the sum of $1.50; and to require the Commissioner of Immigration to satisfy himself whether any passenger was a lewd or debauched woman and if so satisfied to exact a similar bond of the ship-owner or else to commute the bond on the payment of such sum as he might think proper.[10] But none of these cases denies the right of self-protection on the part of the State. They merely rule that the right can only arise from vital necessity and that it cannot be carried beyond the scope of that necessity. They merely hold that in the particular cases passed upon the statutes, though defended as police regulations and as necessary to protect the State against the influx of foreign paupers or persons of immoral character, imposed a burden upon all passengers from foreign countries whether undesirable or not; that they reached far beyond their professed objects; that their purpose was not to obtain protection or indemnity but money.[11]

---

[9] Passenger Cases, 7 Howard 426.

[10] *Henderson* v. *Mayor*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 278.

[11] In the case of *Henderson* v. *Mayor of New York*, 92 U. S. 259, the court said:

"So far as the authority of the cases of *New York* v. *Miln* and Passenger Cases can be received as conclusive, they decide that the requirement of a catalogue of passengers, with statements of their last residence, and other matters of that character, is a proper exercise of state authority, and that the requirement of the bond or alternative payment of money for each passenger is void because forbidden by the Constitution and laws of the United States. * * * *

"The argument has been pressed with some earnestness, that inas-

The local statutes passed and rules adopted in the instances mentioned were in no true sense police regulations. They were not really directed towards or necessary for the protection of the health, morals, safety or even welfare, if the term be used in any proper sense, of the people of the respective states.

It is true that the Constitution imposes no express restrictions upon the treaty-making power. It has al-

---

much as this statute does not come into operation until twenty-four hours after the passenger has landed, and has mingled with or has the right to mingle with the mass of the population, he is withdrawn from the influence of any laws which Congress might pass upon the subject, and remitted to the laws of the State as its own citizens are. It might be a sufficient answer to say that this is a mere evasion of the protection which the foreigner has a right to expect from the Federal Government when he lands here as a stranger, owing allegiance to another government, and looking to it for such protection as grows out of his relation to that government. But the branch of the statute which we are considering is directed to and operates directly on the shipowner. It holds him responsible for what he has done before the twenty-four hours commence. He is to give the bond or pay the money because he has landed the passenger, and he is given twenty-four hours to do this before the penalty attaches. * * * *

"We are of opinion that this whole subject has been confided to Congress by the Constitution; that Congress can more appropriately and with more acceptance exercise it than any other known body to our law, state or national; that by providing a system of laws in these matters applicable to all ports and to all vessels a serious question which has long been matter of contest and complaint, may be effectually and satisfactorily settled. Whether in the absence of such action, the states can, or how far they can, by appropriate legislation, protect themselves, against *actual* paupers, vagrants, criminals and diseased persons, arriving in their territory from foreign countries, we do not decide. The portions of the New York statute which concern persons who, on inspection, are found to belong to these classes, are not properly before us, because the relief sought is to the part applicable to all passengers alike."

In the case of *Chy Lung* v. *Freeman*, 92 U. S. 278, the statute was held invalid on account of its evident unreasonableness rather than on account of a lack of jurisdiction in the State in a proper case. The court, on the question of unreasonableness, said :

"The commissioner has but to go aboard a vessel filled with passengers ignorant of our language and laws, and without trial or hearing or evidence, but from the external appearances of persons with whose former habits he is unfamiliar, to point with his finger to twenty, as in this case, or a hundred, if he chooses, and say to the master, 'These are idiots, these are paupers, these are convicted criminals, these are lewd women, and these others are debauched women. I have here a hundred blank forms of bonds printed. I require you to fill them up and sign each of these for $500 in gold, and that you furnish

ways, however, been conceded that there are implied restrictions.[12] To use the language of the Supreme Court in the case in which it has perhaps gone further than in any other in asserting the supremacy of the treaty-making power,—

'it would not be contended that it (the treaty-making power) extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter without its consent. * * * There are restraints which arise from the nature of the government itself, and of that of the states."[13]

Local home rule is certainly a cardinal principle of the American political system.[14] A distinction has always been made between the commercial power of the nation and its police power. The commercial power is in a large sense in the hands of the Federal Government. The

---

me two hundred different men, residents of this State, and of sufficient means, as sureties on these bonds. I charge you $5 in each case for preparing the bond and swearing your sureties and I charge you seventy-five cents each for examining these passengers, and all others you have on board. If you don't do this, you are forbidden to land your passengers under a heavy penalty. But I have the power to commute with you for all this for any sum I may choose to take in cash. I am open to an offer; for you must remember that twenty per cent. of all that I can get out of you goes into my own pocket, and the remainder into the treasury of California.

"We are not called upon by this statute to decide for or against the right of a State, in the absence of legislation by Congress, to protect itself by necessary and proper laws against paupers and convicted criminals from abroad, nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. When a state statute limited to provisions necessary and appropriate to that object, shall in a proper controversy come before us, it will be time enough to decide that question. The statute of California goes so far beyond what is necessary, or even appropriate, for this purpose, as to be wholly without any sound definition of the right under which it is supposed to be justified. Its manifest purpose, as we have already said, is not to obtain indemnity, but money."

[12] Opinion in *De Geofroy* v. *Riggs*, 10 Sup. Ct. Rep. 295, 297.

[13] Opinion in *De Geofroy* v. *Riggs*, 295, 297.

[14] "The genius and character of the whole government seem to be that its action is to be applied to all of the external concerns of the nation, and to those internal affairs which affect the states generally; but not to those which are completely within a particular state."—Opinion in *Groves* v. *Slaughter*, 15 Peters 51.

police power is essentially in the hands of the constituent states.[15] The treaty-making power is preëminently a commercial power. It should not be made to interfere with domestic policy and local home rule. Nowhere is there to be found in the Federal Constitution any direct recognition of the police power of the State even where treaty obligations are not affected. But that power has been universally conceded. It cannot be maintained for a moment that it was ever intended that the State's inherent right of self-protection should be divested by the treaty-making power and by an action in which the popular representatives of the State can take no part? A treaty and an act of Congress are of equal dignity, and if there is any conflict between the two the latter in date of passage must control.[16] Congress can in no way constitutionally interfere with the internal police of a State. Can it be that a treaty which an act of Congress may nullify can do so? Would Virginia, would Massachusetts herself, ever have come into the Union if they had imagined for a moment that the central government was vested with the power of interfering with matters which were purely local—by treaty with Great Britain, for instance, of providing for the importation of convicts into the several states, of regulating the matter of marriage with British subjects, of prohibiting the separation of blacks and whites in the public schools, or the passage of laws against miscegenation.

---

[15] "It is vital that the independence of the commercial power and of the police power and the delimination between them, however sometimes perplexing, should always be recognized and observed. For while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government. Acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run in the effort to suppress them of more serious consequences by resort to expedients of even doubtful constitutionality. . . . . The regulation of commerce applies to the subjects of commerce, and not to matters of internal police."—Opinion in *U. S.* v. *E. C. Knight Co.*, 156 U. S. 13, 15 Sup. Ct. Rep. 254.

[16] *Whitney* v. *Robinson*, 124 U. S. 190.

It is clear that a State cannot exclude from its borders foreign peoples who are not excluded by Congress, unless it can show a danger peculiar to itself, threatened or actual, which will arise from such importation. If such can be shown, however, there should be no doubt that the right exists, and that an act of Congress or a treaty which would seek to negative the same would itself be unconstitutional. So, too, it may be safely asserted, and even more emphatically, that the Federal Government cannot go still further and dictate to the states the status of all persons admitted within their borders and to utterly disregard the local police necessities of such states. There is no real support in the authorities or in the historical development of the nation for the contention to be found in some of the text-books that the treaties made by the United States are so far the law of the land that "the internal polity of the states does not impose any restrictions upon the power."[17] It is true that the United States courts have held that it is competent for the President and the Senate to remove by means of treaties with certain of the foreign powers the disability of certain classes of aliens to inherit in the several states, to extend the right to hold and to dispose of lands to aliens,[18] to protect the property of foreign subjects from confiscation and alienation[19] and to release an indebtedness due from a foreign government to a private American citizen.[20] In the latter case, however, the court took care to make it plain that it would be necessary for the general government to compensate the citizen for the loss occasioned,[21] while as

---

[17] Black Const. Law., 107.

[18] *Hauenstein* v. *Lynham*, 100 U. S. 489; *Chirac* v. *Chirac*, 2 Wheat. 259; *DeGeofroy* v. *Riggs*, 133 U. S. 258; *In re Droit d'Aubaine*, 8 Op. Attys. Gen. 411; *Kull* v. *Kull*, 37 Hun. 476.

[19] *Ware* v. *Hylton*, 3 Dall. 199; *Society for Propagating the Gospel* v. *New Haven*, 8 Wheat. 464.

[20] *Meade* v. *U. S.*, 2 Ct. Cl. 224.

[21] *Meade* v. *U. S.*, 2 Ct. Cl. 224.

far as the right to hold, dispose of, and to inherit real estate is concerned, the disqualification of aliens is at the best an artificial one, and it is preëminently for the Federal, the national, Government to determine who shall be considered aliens and who not and to remove a restriction which its dictum has in a large measure created.[22]

We can now confine ourselves to a more specific question,—the question as to whether the Federal Government can by treaty or otherwise prevent a State or a city thereof from excluding the Japanese from its public schools, or from requiring such persons to attend schools which are separate and distinct from those patronized by the white inhabitants.

The maintenance of public schools is essentially a matter of State concern. The separation of the races or sexes in such schools is especially one of local police control.

The desire for segregation in the public schools is a desire which is based essentially on a regard for the protection of the public morals and for the preservation and purity of the races—

"The mingling of the blood of the white and of the negro races by interbreeding," says the Supreme Court of Kentucky,[23] "is deemed by the political department of our State Government as being hurtful to the welfare of society, and marriage by members of one race with those of the other is prohibited by statute. It is admitted freely in argument that the subject of marriage is one of the very first importance to society; that it may be regulated by law even as among members of the same race. Inbreeding is found to lower the mental and physical vigor of the offspring. So incestuous marriages are forbidden. Others not incestuous, but involving the probable effect upon the vitality of the offspring, are prohibited also. No one questions the validity of such statutes, enacted, as they confessedly are, under the police power of the State. Upon the same considerations, the same power has been exercised to prohibit the intermarriage of the two races. The result of such marriage would be to destroy the purity of blood and identity of it. It would detract from whatever characteristic force pertained to either."[24]

---

[22] See opinions in *Hauenstein* v. *Lynham*, 100 U. S. 489 and *De Geofroy* v. *Riggs*, 133 U. S. 258.

[23] *Berea College* v. *Commonwealth* 94 *S. W.* 623.

[24] See *Plessy* v. *Ferguson*, 16 Sup. Ct. Rep. 1138

In this connection the language of the Supreme Court of Pennsylvania, which was used in the case of *West Chester Railway Company* v. *Miles*, 93 American Dec., 747, is also well worth considering. It is as applicable to the Chinese and the Japanese as it is to the negroes:

"The danger to the peace engendered by the feeling of aversion between individuals of the different races cannot be denied. If a negro takes his seat beside a white man or his wife or daughter, the law cannot repress the anger or conquer the feeling of aversion which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it. It is much wiser to avert the consequences of this repulsion of race by separation, than to punish afterwards the breach of the peace it may have caused. * * * * The question is one of difference, not of superiority, or inferiority. Why the Creator made one black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage, and that social amalgamation which leads to a corruption of the races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so, it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is not to declare inferiority in either; it is not to declare one a slave and the other a freeman,—that would be to draw the illogical sequence of inferiority from difference only. It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, so far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts."

It would certainly be an abuse of judicial discretion, a substituting of judicial for legislative opinion,[25] for the

[25] For discussion of respective provinces of court and legislature see *Holden* v. *Hardy*, 18 Sup. Ct. Rep. 383.

courts, state or federal, to say that the desire to prevent the intermixture of the Mongolian and Malaysian races with the white was basically unreasonable while sustaining with such absolute unanimity the statutes which seek to prevent the social mingling of the blacks and the whites. As a matter of fact, indeed, the Japanese blood itself is not entirely free from the black taint, if taint it be. It is not entirely Mongolian, nor even Malaysian.[26]

The right to a public-school education at the expense of the State is not a privilege or immunity or a right of liberty or property guaranteed by the Fourteenth Amendment.[27] The State is not compelled to maintain or establish public schools. If, however, public schools are established and are supported by public taxation, the exclusion of negro or Mongolian children from them will be deemed a denial of that equal protection of the laws which is guaranteed by the Fourteenth Amendment to all persons within the United States, whether citizens or not,[28] unless separate schools are maintained for the education of both colored, yellow and white children, which are of equal excellence and furnish equal advantages. If such schools are furnished no objection can be raised to laws which require the different classes of children to attend their separate schools,[29] and the mere fact that the children of one class are compelled to go further to their school than the children of another has been held to afford no serious ground for complaint.[30]

---

[26] See Townsend on Europe and Asia.

[27] *People* v. *Gallagher*, 93 N. Y. 438.

[28] *Claybrook* v. *Owensboro*, 16 Fed. Rep. 297; *Ward* v. *Flood*, 48 Cal. 50; *People* v. *Board of Education*, 18 Mich. 400; *State* v. *Dugan*, 15 R. I. 403; *Dawson* v. *Lee*, 83 Ky. 49.

[29] *Ward* v. *Flood*, 48 Cal. 51; *U. S.* v. *Buntin*, 10 Fed. Rep. 730; *Berteneau* v. *City Schools*, 3 Woods (U. S.) 177; *Martin* v. *Board of Education* (*W. Va.*) 26 S. E. 348; *People* v. *School Board*, 161 N. Y. 598; Chinese: *Wong Him* v. *Callahan*, 119 Fed. Rep. 331.

[30] *Ward* v. *Flood* 48 Cal. 52; *Lehew* v. *Brummell*, 103 Mo. 546; *People* v. *Gallagher*, 93 N. Y. 451.

It is perfectly competent, in short, for the state to recognize innate racial distinctions and prejudices, and, within reasonable limits, to provide for the segregation of colored, Mongolian and Malaysian children. Of the necessity for such segregation the state legislatures should in a large measure be the judges.[31] It is very doubtful whether a local school board has the right to establish separate schools without express legislative authority,[32] but the right of the legislature to grant such authority seems never to have been seriously questioned by the courts. So firmly indeed has the doctrine been established that the power to segregate the races is a police power and one which rests upon the fundamental right of race preservation, that there can now be no reasonable doubt that the courts would generally concede to the legislatures the right to apply the rule to schools kept by private individuals and even to school corporations whose charters contain no limitations on the subject.[33] No one

---

[31] "The validity of the statute referred to does not depend upon the motive which may in fact have actuated the members of the legislature in voting for the enactment. Upon such an inquiry the courts have no right to enter . . If the law does not conflict with some constitutional limitation of the powers of the state legislature, it cannot be declared invalid." *Wong Him* v. *Callahan*, 119 Fed. Rep. 331.

[32] *Smith* v. *Independent School Dist.*, 40 Iowa 518; *Dodd* v. *Independent School Dist.*, 41 Iowa 689; *Board of Education* v. *Tinnon*, 26 Kansas 1; *Clark* v. *Board of Directors*, 24 Iowa 26.

Contra: *Roberts* v. *Boston*, 5 Cush. (Mass.) 198; *Cory* v. *Carter*, 48 Ind. 327.

[33] "*Berea College* v. *Commonwealth* 94 S. *W.* 623. In commenting on this case the *Harvard Law Review* (Vol. XX, p. 74) recently said:

'In the present case the court bases its judgment on the same argument used to support the statutes just referred to namely, the reasonableness of preventing relations which might lead to intermarriage and to breaches of the peace; but, *as the present statute extends to private institutions, the decision apparently goes further than in any previous case, and probably reaches the limit.*' The suggestion contained in this paragraph has but little if any support in the authorities. That statutes of the class mentioned would be held reasonable, and therefore valid when applied to private unincorporated schools there can be but little question. They are based on the same considerations which lead to the forbidding of the intermarriage of the two races, and of associations which lead thereto. The private school would be just as injurious in this respect as the public."

legislature can by the granting of charters or otherwise barter away the police powers of its successors. A charter which negatived this right of interference by the State in such matters when the exigency arose would to that extent at least be invalid.[34] An insistence, however, is had upon the adoption of a policy which shall render perfect justice between the parties concerned. It is not sufficient to apply to the support of the separate schools the money alone which is raised from the taxation of the colored or Mongolian or Malaysian populations. The school system must be considered as an entirety and the moneys collected therefor as an entire fund. The public as a public, irrespective of the negroes or Mongolians or Malaysians affected, has the right to insist that such persons receive the same education and the same advantages as the other races.[35]

The question of segregation is not a new one in America, nor is it of Southern or Western origin.

The courts of today in affirming the right indeed invariably refer to and quote with approval language used by Chief Justice Shaw of the Supreme Court of Massachusetts in an opinion which was handed down more than half a century ago—

"The great principle advanced by the learned and eloquent advocate of the plaintiff," said the Chief Justice,[36] "is that by the Constitution and laws of Massachusetts all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. This, as a broad general principle, such as ought to appear in a declaration of rights, is perfectly sound. It is not only expressed in terms, but pervades and animates the whole spirit of our Constitution of free government. But when this great principle comes to be applied to the actual and various conditions of persons in society it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment;

---

[34] *Fertilizing Co.* v. *Hyde Park*, 98 U. S. 759.

[35] *Claybrook* v. *City of Owensboro*, 16 Fed. Rep. 297.

[36] *Roberts* v. *City of Boston*, 5 Cush. 198, 206, 208, 209.

but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security. What those rights are to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions. Conceding, therefore, in the fullest manner, that colored persons, the descendants of Africans, are entitled by law, in this commonwealth, to equal rights, constitutional and political, civil and social, the question then arises whether the regulation in question, which provides separate schools for colored children, is a violation of any of these rights. * * * The power of general superintendence vests a plenary authority in the committee to arrange, classify and distribute pupils in such a manner as they think best adapted to their general proficiency and welfare. If it is thought expedient to provide for very young children, it may be that such schools may be kept exclusively by female teachers, quite adequate to their instruction, and yet whose services may be obtained at a cost much lower than that of more highly-qualified male instructors. So if they should judge it expedient to have a grade of schools for children from seven to ten, and another for those from ten to fourteen, it would seem to be within their authority to establish such schools. So to separate male and female pupils into different schools. It has been found necessary—that is to say, highly expedient,—at times to establish special schools for poor and neglected children, who have passed the age of seven, and have become too old to attend the primary school, and yet have not acquired the rudiments of learning to enable them to enter the ordinary schools. If a class of youth of one or both sexes is found in that condition, and it is expedient to organize them into a separate school to receive the special training adapted to their condition, it seems to be within the power of the superintending committee to provide for the organization of such special schools. * * * The committee, apparently upon great deliberation, have come to the conclusion that the good of both classes of schools will be best promoted by maintaining the separate primary schools for colored and for white children, and we can perceive no ground to doubt that this is the honest result of their experience and judgment. It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools may well be doubted. At all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence, and we cannot say that their decision upon it is not founded upon just grounds of reason and experience and in the result of a discriminating and honest judgment."[37]

---

[37] In passing upon a similar question,—that is, the right of the State to require railway companies to provide equal, but separate, accommodations for the white and colored races, the Supreme Court of the United States in the case of *Plessy* v. *Ferguson*, 16 Sup. Ct. Rep. 1138, 1140, said:

"The object of the amendment (14th) was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based

In the decisions which have sustained the statutes which have provided for the segregation of negro and of Chinese children particular pains have been taken to emphatically repudiate any recognition of any suggestion of inferiority in the acts passed upon,—

"If this be so," the judges say, "it is not by reason of anything found in the acts, but solely because the colored race chooses to put that construction upon them."[38]

It would seem therefore, if in its sound discretion the legislature of a State deems it necessary, it may provide for the segregation of the Japanese as well as of the Chinese. The matter is one largely of legislative discretion and above all of State cognizance. It is useless to argue that the Japanese have attained to a civilization which is higher than that of the Chinese or of the Negro, or that his blood is purer than theirs.[39]

As we have before seen, however, the Fourteenth Amendment to the Federal Constitution offered its protection to all, and equal facilities can be demanded by all. In this respect the situation now found in San Francisco is somewhat anomalous. There were in San Francisco before the recent disaster, according to the reports, two

---

upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power."

[38] *Plessy* v. *Ferguson*, 16 Sup. Ct. Rep. 1138, 1143.

[39] "It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states; some holding that any visible admixture of black blood stamps the person as belonging to the colored race. *State* v. *Chavers*, 5 Jones (N. C.) 1. Others that it depends upon the proportion of blood *Gray* v. *State*, 4 Ohio, 354; *Monroe* v. *Collins*, 17 Ohio St. 665; and still others that the preponderance of white blood must only be in the proportion of three-fourths. *People* v. *Duan*, 14 Mich. 406; *Jones* v. *Com.* 80 Va. 544. But these are questions to be determined under the *state laws*, and are not properly put in issue in this case." Opinion in *Plessy* v. *Ferguson*, 16 Sup. Ct. Rep. 1138, 1144.

schools set aside for the exclusive use of Chinese and Japanese students, which were as good in every respect as those opened to the children of the white people. These schools were destroyed during the earthquake. The commingling of the orientals with the white children in the crowded school-rooms that remained intact after the catastrophe caused the revival of the agitation for separate schools and the order excluding the orientals from the school in question. The fact that many of the Japanese who attended the primary classes in reading and writing were adults, and much older than the children with whom they associated was an added reason for dissatisfaction. The chief objections raised to the action of the San Francisco authorities was not that they segregated, but that for the time being they denied school privileges to, the Chinese and Japanese. To this action, if only temporarily insisted upon, and while reasonable efforts were being made for securing other and proper quarters, no reasonable objection could be had. The point indeed seems to have been foreshadowed if not directly passed upon in the case of *Cumming* v. *Board of Education* in which the Supreme Court of the United States,[40] in the year 1899, refused to review the action of the courts of Georgia in denying an injunction against the maintenance by a board of education of a high school for white children while failing to maintain one for colored children also, for the reason that the funds were not sufficient to maintain it in addition to needed primary schools for colored children. That the practice, however, cannot be long continued is perfectly clear. It was indeed expressly forbidden by the Supreme Court of California itself, as early as the year 1874, in a dictum it is true, but in a dictum which was plain and emphatic and delivered for a purpose.

---

[40] Sup. Ct. Reporter 197, 201.

"In order to prevent a possible misapprehension, however," that dictum ran,[41] "we think proper to add that in our opinion, and as a result of the views here announced, the exclusion of colored children from schools where white children attended as pupils, cannot be supported except under the conditions appearing in the present case; that is, except where separate schools are actually maintained for the education of colored children; and that, unless such separate schools be in fact maintained, all children of the school district, whether white or colored, have an equal right to become pupils at any common school organized under the laws of the state, and have a right to registration and admission as pupils in the order of their registration."

In conclusion, it should be added that there is no legal warrant or justification for the promise made by the State Department to the Japanese Government in the letter written by that department, on 27th of October, to the American Ambassador at Tokio, to the effect that—

"You may assure the Government of Japan in most positive terms that the Government of the United States will not for a moment entertain the idea of any treatment towards the Japanese people other than that accorded to the people of the most friendly European nations, and that there is no reason to suppose that the people of the United States desire our government to take any different course."

That the people of California must afford to the Japanese equal rights under the law, as persons, is clear. That they must or can be compelled to treat the Japanese, as far as separate schools is concerned, on the same basis as Englishmen or Germans or Norwegians is not clear at all. Nor, too, is there any foundation for the assumption that the treaty with Japan, even if that treaty could be made binding in matters of mere police control upon the State of California, guarantees any such treatment. The treaty in question merely provides that—

"The citizens or subjects of the two countries shall have full liberty to enter, travel or reside in the territory of either country, enjoy full and perfect protection of person and property, have free access to the courts of justice, be at liberty to employ lawyers and representatives to defend their rights before the courts; that in whatever relates to the rights of residence, travel, possession of goods, succession to personal estate, and disposition of property, the subjects of the two

[41] *Ward* v. *Flood*, 48 California 36, 56.

countries shall enjoy in the territories of the other the same liberties privileges and rights with entire liberty of conscience, subject only to the laws, ordinances and regulations."

It has been repeatedly held, even as against native-born American citizens, and especially as against the native-born negro, that there is no right of liberty or property guaranteed by the Federal or the State constitutions in that which is inherently hurtful to the community as a whole.[42] The words liberty and property as used in the treaty with Japan can certainly have no broader meaning than when used in the Fifth and in the Fourteenth amendments to the Federal Constitution. If the native-born negro cannot insist upon attending the same schools as his white brethren, can it be that the Japanese alien may do so?

Andrew Alexander Bruce.

UNIVERSITY OF NORTH DAKOTA.

[42] See Article on The Individualism of the Constitution, Central L. J. Vol. 62, p. 377.